

certiorari addressed to the Supreme Court of the State of Idaho, commanding said court and the clerk thereof to certify to this court the record and proceedings of the case in said court wherein your petitioner was respondent and the respondent, Chicago, Milwaukee & St. Paul Railway Company, a corporation of the State of Wisconsin, was appellant, together with its opinion therein for the review and determination of said cause by this court.

The reasons relied on for the issuance of said writ and upon which your petitioner believes that a writ ought to be issued, and which will be more fully stated hereafter may be summarized as follows:

First: The Supreme Court of the State of Idaho misinterpreted the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stats. at Large, page 65, in holding that the petitioner was not engaged in interstate commerce within the meaning of said act at the time of receiving his injury.

Second: "In the interest of jurisprudence and uniformity of decision" between this court and the said Supreme Court of the State of Idaho there being a substantial conflict of decisions on a vital and controlling matter of law involved in this cause between the said Supreme Court of the State of Idaho

and this court in respect to the construction and application of said Federal Employers' Liability Act.

Third: Because there is in like manner a conflict in decisions between the said Supreme Court of the State of Idaho and decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits on a controlling and decisive question of law involved in this case in respect to the construction and application of the said Federal Employers' Liability Act.

In this behalf your petitioner states the following facts:

Your petitioner brought this action against the respondent in a state court of competent jurisdiction in the State of Idaho to recover damages for personal injuries, resting his right of action solely upon the Federal Employers' Liability Act.

The respondent was engaged in operating a railroad extending from Chicago, Illinois, to Seattle, Washington, used for the transportation of both interstate and intrastate commerce.

The injuries complained of were received in the State of Washington while petitioner was engaged in filling with dirt a wooden trestle upon the main line railroad track of the respondent. The

fill had progressed to the extent that the dirt had reached the top of the railroad ties and rails and it had become necessary after dumping cars of dirt to use a machine known as a bulldozer to spread the dirt away from the track, thereby widening the fill and keeping the track clear. The bulldozer was a flat car with adjustable wings extending on either side from a point slightly over the rails and spreading out toward the back of the car.

The duty of the petitioner was to adjust these wings to determine where dirt should be dumped and while waiting for another trainload of dirt, with his coemployee, use shovels to clear the track of rocks and material which had lodged between the rails. The wings of the bulldozer were outside of the rails of the track and only spread the dirt from the rails outward, the petitioner and his co-employee cleaning the inside thereof with their shovels.

During the time this work was being carried on, the interstate trains of respondent were passing to and fro over the said track and trestle.

The dirt was being transported to the trestle by means of two trains of about 25 dump cars each. When the train approached the bridge it would couple onto the dozer and proceed to the place where

the dirt was to be dumped, as directed by your petitioner. After dumping the dirt, the cars would be righted, the train start back pulling the dozer after it. The wings of the dozer would then be operated so as to level down the dirt which had been dumped, and the dozer would be uncoupled from the dump train and left at or near the end the bridge, then the petitioner and his co-employe would take shovels and clear between the rails.

At the time of receiving his injury, your petitioner was standing on the front of the dozer waiting for the dirt train to couple on. While so waiting, he was looking over the fill to determine where the next trainload of dirt should be dumped.

Your petitioner asserted that through the negligence of the respondent, the train, while approaching the dozer, was going at so great a rate of speed that when it coupled onto the dozer it broke his hold upon the cross-rods and crank shaft, threw him violently to the ground between the wheels of the rear car and the dozer and severely and permanently injured him.

The case was tried before a jury. The trial court held that the petitioner was engaged at the time of his injury in interstate commerce and was

entitled to maintain his action under the Federal Employers' Liability Act, and submitted the questions of fact to the jury for determination.

A general verdict was returned in favor of the petitioner and in addition thereto, at the request of the respondent, certain interrogatories were submitted to the jury for answer, and by their answers the jury found the petitioner free from contributory negligence.

The railroad company asked for a new trial. Its petition therefor was denied and an appeal was taken to the Supreme Court of the State of Idaho. The Supreme Court of the State of Idaho reversed the judgment on the sole ground that this petitioner was not engaged in interstate commerce at the time of his injury so as to entitle him to maintain an action for personal injury under the Federal Employers' Liability Act, and directed that the judgment be reversed, with instructions to dismiss the action.

Your petitioner is advised that the said judgment of the Supreme Court of the State of Idaho is final and is erroneous and This Honorable Court should require the case to be certified to it for its review and determination.

Your petitioner further amplifies the grounds for requesting that a writ of *certiorari* be ordered herein.

First: The Supreme Court of Idaho misinterpreted the Federal Employers' Liability Act and the decisions of this court, particularly the decisions of this court in the case of

Pedersen v. D. L. & W. R. Co., 229 U. S. 146

Raymond v. C. M. & St. P. R. Co., 243 U. S. 43

in holding that the employment in which the petitioner was engaged was new construction work; that the work which he was performing was being done independently of interstate commerce in which the defendant was engaged, and was a matter of indifference to that commerce and not so closely connected therewith as to be a part of it.

Your petitioner respectfully contending that the replacing of the bridge which had long been an instrumentality used in Interstate commerce with a fill and the employment of petitioner in keeping the track, both outside the rails and between the rails, clear of obstructions for the purpose of permitting interstate trains to operate over the said piece of track during the course of the replacement, was work

of such character that the petitioner was within the terms of the Federal Employers' Liability Act.

Second: The Supreme Court of Idaho, as your petitioner respectfully contends, has misconstrued and misapplied the decisions of this court, as in the first ground above stated, in holding that the petitioner was not engaged at the time of his injury in interstate commerce within the meaning of said Federal Employers' Liability Act, but was engaged in new construction work which was being done independently of interstate commerce in which the defendant was engaged and was not so closely connected therewith as to be a part of it.

The decision of said Supreme Court of Idaho is in conflict with the decision of this court in the Pedersen case and misconstrues and misapplies both the decision in that case and the decision of this court in

Raymond v. C. M. & St. P. R. Co., 243 U. S. 43

Third. A conflict of decisions exists between the Supreme Court of the State of Idaho in this case and the Circuit Court of Appeals for the Sixth Circuit in a like case, to-wit, the case of

Cincinnati N. O. & T. P. R. Co. vs. Hall, 243 Fed. 76

in which case the Circuit Court of Appeals for the Sixth Circuit held that work being performed in replacing an old bridge with a new one was of such character that an employe engaged in the work was engaged in interstate commerce within the meaning of said Federal Employers' Liability Act.

A conflict of decisions also exists between said Supreme Court of the State of Idaho in this case and the Circuit Court of Appeals for the Fourth Circuit in the case of

Southern Ry. Co. v. M'Guin, 240 Fed. 649

in which *certiorari* was denied by this court, 244 U. S. 653.

Your petitioner in the brief accompanying this petition will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Supreme Court of the State of Idaho and the opinion of said court.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court, directed to the Supreme Court of the State of Idaho, sitting at Boise, Idaho, commanding the said Court to certify and send to this

court on day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Idaho had in said cause. To the end that the said cause may be reviewed and determined by this honorable court as provided by law and that the said judgment of the Supreme Court of the State of Idaho be reversed by this honorable court and for such further relief as may seem proper. And your petitioner will ever pray.

JOHN P. GRAY,
Coeur d'Alene, Idaho.
Counsel for Petitioner.

STATE OF IDAHO,
COUNTY OF KOOTENAI—ss.

JOHN P. GRAY, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, Wm. Kinzell; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

JOHN P. GRAY.

Subscribed and sworn to before me this 21st day of May, 1918.

(Seal)

F. MEADE,

Notary Public in and for the State of Idaho, residing at Coeur d'Alene, Idaho.

My commission expires Sept. 9, 1919.

I do hereby certify that I have carefully examined the foregoing petition for a writ of *certiorari* and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

JOHN P. GRAY.

Counsel for Petitioner.